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Nos. 02-241 and 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs.

Cato also has had a longstanding interest in circumscribing the use by government of racial and ethnic classifications—a practice fundamentally at odds with constitutional principles of ordered liberty and impartial government, as enshrined in the equal protection and due process guarantees of the Fifth and Fourteenth Amendments. The instant cases raise squarely the continued legality of such racial and ethnic preferences for admission to state universities and colleges and thus are of central concern to Cato and the Center.[1]

SUMMARY OF ARGUMENT

This litigation involves not a challenge to "affirmative action" *simpliciter*, whether understood as the use of race-conscious remedies for proven race-based discrimination by state actors or outreach efforts to communicate the University of Michigan's equal opportunity and non-discrimination policies as a means of enlarging the pool of applicants. Rather, seizing on Justice Powell's endorsement of "educational

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[1] In conformity with Supreme Court Rule 37.6, *amicus* has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. *Amicus* also states that no party or counsel for a party has authored this brief in whole or in part; and no person or entities other than *amicus*, its members and counsel have made a monetary contribution to the preparation and submission of this brief.

diversity" as a possible compelling state interest for equal protection purposes in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), the University and its Law School have sought to justify an admissions scheme that explicitly seeks to ensure the admission each year of a "critical mass" of students from selected minority and ethnic groups. The University's undergraduate schools strive to accomplish this objective by automatically awarding 20 points (out of a total of 150 points) for membership in particular minority groups; the Law School pursues this end by monitoring applications to ensure that members from favored minority groups comprise 10-17 percent of its student body. Expert opinion, credited below, indicated that membership in certain racial and ethnic groups increased the odds of Law School acceptance "many, many (tens to hundreds) times" that of similarly situated non-minority applicants.

Respondents' reliance on Justice Powell's *Bakke* position is problematic because Powell's discussion of diversity reflected the views of only one member of the Court and did not state a holding even in that case since a program of the type he suggested he would favor was not before the Court. Moreover, his position that educational diversity might provide a compelling justification for government use of race has never commanded the support of a majority of the Court. But even under the terms of the Powell opinion, the University's pursuit of a "critical mass" of minority students through racial and ethnic preferences cannot be squared with Justice Powell's insistence on a truly individualized assessment of the merits of applicants in which individuals are treated as individuals; race serves as only one among many factors potentially contributing to a diverse educational experience; and all applicants are placed "on the same footing for consideration" irrespective of race or ethnicity.

Respondents' "critical mass" rationale is entirely at odds with the very notion of an individualized consideration as

envisioned in the Powell opinion. Respondents justify the need for a "critical mass" in order to provide a supportive environment to enable minority students to discuss freely their experience. Whatever its merits as a pedagogic tool, "critical mass" calculations inevitably elide into notions of appropriate group representation. They have "no logical stopping place," a critical deficiency under "strict scrutiny" analysis as Justice Powell emphasized in his opinion for the plurality in *Wygant v. Jackson Board of Educ.*, 467 U.S. 267 (1986), and Justice O'Connor reaffirmed in her opinion for the plurality in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). Indeed, if sustained as a matter of equal protection, they provide the very path to a societal "spoils system," the avoidance of which prompted Justice Powell in *Bakke* and *Wygant*, the plurality in *Croson*, and the Court in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), to insist on "strict scrutiny" whenever government uses race or ethnicity to allocate public resources or burdens.

Twenty-five years after *Bakke*, it may be time for the Court to make clear that educational or pedagogic diversity, while a desirable objective, cannot be pursued through government awards of racial or ethnic preferences. Because such preferences reflect outright racial stereotyping about how people will (or should) think or behave on account of their skin color or ethnicity, they cut against bedrock constitutional principle that forbids government to judge individuals as members of racial or ethnic groups. Whether or not individuals from historically disadvantaged groups may derive some advantage from these programs, the state's awarding of valuable opportunities on the basis of skin color or ancestry necessarily diminishes those who are not benefited and, more importantly, erodes the national fabric and commitment to equality of opportunity.

Respondents' position is no less constitutionally infirm even if it were to abandon its doubtful claim that race is an

appropriate proxy for viewpoint diversity and predicate its preferential admissions scheme on the need to provide useful lessons in group tolerance for non-minority students or, more likely, appropriate representation of certain minority groups in selective institutions of higher learning. Because of the availability of a great many race-neutral means of furthering a message of tolerance, the University's empathy/tolerance rationale simply does not exhibit the element of necessity, of overriding justification, required of a "compelling" justification that comports with equal protection.

The University's group-representation rationale is likely what animates preferential admissions policies in the nation's elite institutions of higher learning. Here, preferences serve principally not to enlarge the supply of qualified minority students but, rather, to distribute that supply in favor of the more selective schools. In any event, the use of race and ethnicity simply to ensure a desired racial and ethnic representation plainly fails "strict scrutiny" review, as this Court has made clear in *Croson, Adarand*, and Voting Rights Act cases like *Miller v. Johnson*, 515 U.S. 900 (1995).

Respondents and their amici are likely to argue that legitimate reliance interests will be unraveled by a ruling striking down the University's racial and ethnic preferential admissions program. This claim lacks all merit as (1) Justice Powell's discussion of the "Harvard Plan" in *Bakke* was not necessary to resolve the merits of the "reserved places" or "set aside" plan struck down in that case; (2) respondents' use of race and ethnic preferences exceeds, by a good margin, the limited consideration of race envisioned in the Powell opinion; (3) respondents and other public universities have been put on notice at least since this Court's 1995 ruling in *Adarand* that all government classifications based on race would receive "strict scrutiny" and, in light of its prior rulings in *Wygant and Croson*, nonremedial use of race would likely trigger an especially heavy burden of justification; and (4) the

constitutionality of public university use of race and ethnicity in admissions decisions has been heavily contested in the lower courts. In short, respondents simply have taken an aggressive view of what the Constitution permits, hardly a basis for arguing reliance on well-established constitutional precedent in their favor.

STATEMENT OF FACTS

The instant cases challenge government's use of racial and ethnic preferences in allocating valuable economic and personal benefits, here admissions to state universities and colleges. This challenge does not necessarily place in question every practice that has come to be labeled "affirmative action," a term that is widely used but rarely defined. There is nothing in the constitutional provisions or relevant statutes (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 42 U.S.C. 1981) invoked by petitioners that bars the state from remedying past discrimination practiced by its universities, colleges, or other units, even where, on an appropriate record, such remedies involve redress to individuals of a particular race or ethnicity who have been victimized by such discrimination. *See, e.g., Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). The University of Michigan and its Law School, respondents in the instant cases, candidly eschew any reliance on such remedial use of race and ethnic classifications.[2]

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[2] The District Court in the *Gratz* case found: "The University Defendants have never justified the [University of Michigan's College of Literature, Science, and the Arts ("LSA")'s] race-conscious admissions policies on remedial grounds." 122 F.Supp. 2d 811 (E.D. Mo. 2000); App. to Pet. for Writ of Cert., No. 02-516, App. A, p. 33a [hereinafter cited as "*Gratz* Pet. App."] To like effect, the District Court in the *Grutter* litigation noted that Professor Richard Lempert, the University of Michigan Law School professor who chaired the faculty committee that drafted the Law School's 1992 admissions policy, "stated that this was not

Nor should this challenge raise any doubts over the validity of what might be termed "affirmative outreach," that is, practices whereby the University of Michigan communicates to all potential students, including students from under-served groups or regions, its policy of equal opportunity and non-discrimination, or otherwise engages in race-neutral recruitment aimed at its enlarging its pool of qualified candidates, including minority candidates. But respondents' preferential admissions programs go well beyond such efforts to improve the overall pool of applicants.

Rather, invoking Justice Powell's opinion announcing the judgment of the Court in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), the University of Michigan and its Law School have seized upon the rationale of "educational diversity" to justify an admissions scheme that explicitly seeks to ensure the admission each year of a "critical mass" of members of selected minority and ethnic groups—for the Law School, in the range of 10-17 percent of the student body. The Law School boldly states: "It is obvious that *race matters* to a great many issues that the Law School considers central to its chosen pedagogical mission," Br. in Oppos., No. 02-241, p. 2 (emphasis in original). In fact, the Law School and its parent institution act to ensure that "race matters"—and that it will continue to "matter" in Michigan's publicly funded colleges and universities—by allocating valuable, state-subsidized opportunities on the basis of one's race, and by premising those awards on the proposition that individuals with a particular skin color or ethnic background are likely to articulate particular views in the classroom. Respondents'

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intended as a remedy for past discrimination, but as a means of including students who may bring to the law school a perspective different from that of members of groups which have not been the victims of such discrimination." 137 F.Supp. 2d 821 (E.D. Mich. 2001), reversed *en banc*, 288 F.3d 732 (6th Cir. 2002); App. to Pet. for Writ of Cert., No. 02-241, App. G, p. 213a [hereinafter cited as "*Grutter* Pet. App."]

preferential admissions policies, if upheld, can only serve further to delay realization of the sacred constitutional promise of equal opportunity: the "dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."[3]

Respondents' opposition papers imply that their use of racial and ethnic preferences share some similarity to the individualized review of the merits of applicants that Justice Powell endorsed in his *Bakke* opinion. We believe that respondents' view cannot be squared with the findings of the trial courts below, which respondents have not challenged as instances of clear error.

The Gratz *Litigation*

In *Gratz v. Bollinger*, 122 F.Supp. 2d 811 (E.D. Mich. 2000) (No, 02-516) [hereinafter cited as "*Gratz*"], the District Court made the following pertinent findings:

- "From 1998 through the present, the [University of Michigan's College of Literature, Science, and the Arts ("LSA")] has used a 150 point system, under which admissions decisions were generally determined by the applicant's rank on the 150 point scale. Under-represented minority applicants *automatically receive 20 points based upon their membership in one of the identified under-represented minority categories*." 122 F.Supp. 2d at 827 (emphasis supplied); App. to Pet. for Writ of Cert., No. 02-516, p. 33a [hereinafter cited as "*Gratz* Pet. App."][4]

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[3] Martin Luther King, Jr., *I Have a Dream*, available at http://web66.coled.umn.edu/new/MLK/MLK.html

[4] In addition, all applicants, *including* minority applicants, can receive "six points awarded for geographic factors, four points awarded for alumni relationship, three points awarded for an outstanding essay, five points awarded for leadership and service skills, twenty points awarded for socioeconomic status, or twenty points awarded for athletes." 122

- "In 1999 and 2000, the LSA also added a system whereby certain applicants, including under-represented minority applicants, could be 'flagged,' thereby keeping such applicants in the review pool for further consideration," 122 F.Supp. 2d at 827; *id.* at 33a-34a, even though such applicants "may not necessarily pass the LSA's initial admit threshold," 122 F.Supp. 2d at 827; *id.* at 35a.[5]
- The University's LSA "prior practice" reserved places for "qualified" minority candidates—a practice the District Court found unconstitutional under the rationale of Justice Powell's opinion in *Bakke*. 122 F.Supp. 2d at 832-33; *Gratz* Pet. App., p. 45a. From 1995 through 1997, the LSA used 'facially different grids and action codes based solely upon an applicant's race," under

F.Supp. 2d at 828; *Gratz* Pet. App., p. 36a. The District Court in *Gratz* did not specifically identify the "under-represented minority categories" that called for the 20-point boost. However, the "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process [hereinafter cited as "Joint Summary of Undisputed Facts"], filed with the District Court, states: "The University considers African-Americans, Hispanic-Americans, and Native Americans to be under-represented minorities." *Gratz* Pet. App., p. 111a.

[5] Admissions counselors are automatically authorized, but not required, to "flag" applicants who are members of the designated "under-represented minority categories," although other applicants may also be flagged if they are in the top of their class, reside in a preferred county of Michigan, or exhibit any "unique life experiences, challenges, circumstances, interests, or talents," or certain other factors. 122 F.Supp. 2d at 829-30; *Gratz* Pet. App., pp. 39a-40a.. This change in the "flagging" practice to include non-racial criteria appears to have begun only with respect to the 1999 and 2000 academic years. *See* Joint Summary of Undisputed Facts, *Gratz* Pet. App., p. 117a. Also, "starting with the academic year 1999, the University abandoned its prior approach of immediately admitting all qualified under-represented minorities, and now defers or postpones some of these applications. Similarly, the University has discontinued its use of 'protected seats.'" *Id.* at 118a.

which "non-preferred applicants were automatically excluded from competing for a seat in the class without any type of individualized counselor review solely on account of their race, whereas, preferred minority applicants were never automatically rejected, regardless of their grades and test scores. Rather, all minority applicants received some type of individualized counselor review," 122 F.2d at 832; *id.* at 46a. This practice, too, was found invalid under Justice Powell's opinion in *Bakke*. *See* 122 F.Supp. 2d at 833; *id.* at 47a-48a.

The University respondents did not contest these findings, most of which are also contained in a "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process," filed with the District Court. *See Gratz* Pet. App., App. J.

The District Court granted the plaintiffs' motion for summary judgment with respect to LSA's admissions programs in effect from 1995 through 1998, and granted the University's motion for summary judgment with respect to LSA's admissions programs for 1999 and 2000. *Gratz* Pet. App., App. B. On December 2, 2002, this Court granted *certiorari* before judgment.

The Grutter *Litigation*

In *Grutter v. Bollinger*, 137 F.Supp. 2d 821 (E.D. Mich. 2001), reversed en banc, 288 F.3d 732 (6th Cir. 2002) (No. 02-241) [hereinafter cited as "*Grutter*"], the District Court, in striking down the Law School's racial/ethnic preference admissions program for African American, Native American, Mexican American, and mainland Puerto Rican students, made the following pertinent findings of fact:

- The Law School highlights its "*commitment to one particular type of diversity* . . . . This is a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been

historically discriminated against, like African-Americans, Hispanics and Native-Americans, who without this commitment might not be represented in our student body in meaningful numbers. These students are particularly likely to have experiences and perspectives of special importance to our mission." 137 F.Supp. 2d at 827-28 (emphasis supplied; quoting from Law School's extant admissions policy adopted in April 1992); App. to Pet. for Writ of Cert., No. 02-241, p. 198a [hereinafter cited as "*Grutter* Pet. App."].

- The Law School's "commitment" embraces the notion of admitting a "'critical mass' of minority students," 137 F.Supp. 2d at 828; *id.* Its formal admissions documents do not specify what percentage of the student body would constitute the desired "critical mass." However, the trial court quoted testimony from admissions officials that the Law School's "goal" or "target" was increased in the 1970s from 10% to 10-12%. *See* 137 F.Supp. 2d at 830-31; *id.* at 205a. Dean Jeffrey Lehman testified that while he could not quantify "critical mass," "he acknowledged that minority students have constituted at least 11% of every entering class since 1992." 137 F.Supp. 2d at 834; *id.* at 211a. Indeed, the District Court found that the upper range was closer to 17%: "The actual admissions and graduation statistics confirm the law school's commitment to enroll African American, Native American and Hispanic students in the 10-17% range," 137 F.Supp. 2d at 840; *id.* at 225a.; "the written and unwritten policy at the law school charges the admissions office with assembling entering classes which consist of between 10% and 17% African American, Native American, and Hispanic students. Over the years this target has been achieved, and even exceeded despite the underrepresented minority students' generally lower LSAT scores and undergraduate GPA's." 137 F.Supp. 2d at 842; *id.* at 229a-230a.

- The Law School, in practice, adopted considerably lower admissions standards for minority candidates. Thus, for example, for the 1995 academic year, Dean Lehman "acknowledged that all African American applicants with an LSAT score of 159-60 and [a grade point average, termed "UGPA"] of 3.00 were admitted, whereas only one of 54 Asian applicants and four of 190 Caucasian applicants with these qualifications were admitted." 137 F.Supp. 2d at 834 n.13; *id.* at 211a-212 a, n. 13. Expert testimony, credited by the trial court,[6] indicated that "membership in certain ethnic groups is an extremely strong factor in the decision for acceptance," as applicants from the preferred minority categories "in the same LSAT x GPA grid cell as a Caucasian American applicant have odds of acceptance that is [sic] *many, many (tens to hundreds) times that of a similarly situated Caucasian American applicant*." 137 F.Supp. 2d at 837; *id.* at 218a-219a (emphasis supplied; quoting testimony of plaintiffs' expert Dr. Kinley Larntz, professor emeritus, department of applied statistics, University of Minnesota). *See* also 137 F.Supp. 2d at 837-39; *id.* at 219a-222a.[7]

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[6] "The court specifically adopts Dr. Larntz's analysis and his conclusion that 'membership in certain ethnic groups is an extremely strong factor in the decision for acceptance."137 F.Supp. 2d at 841; *Grutter* Pet. App, p. 227a.

[7] Judge Bogg's dissent in *Grutter* notes: "[U]nder-represented minorities with a high C to low B undergraduate average are admitted at the same rate as majority applicants with an A average with roughly the same LSAT scores. Along a different axis, minority applicants with an A average and an LSAT score down to 156 (the 70th percentile nationally) are admitted at roughly the same rate as majority applicants with an A average and an LSAT score over a 167 (the 96th percentile nationally). The figures indicate that *race is worth over one full grade point of college average or at least an 11-point and 20-percentile boost on the LSAT*." 288 F.3d at 796 (emphasis supplied); *Grutter* Pet. App., pp. 131a-132a.

- The trial court also found it "significant that the dean and admissions director monitor the law school's 'daily admissions reports,' which classify applicants by race. These reports inform the reader how many students from various racial groups have applied, how many have been accepted, how many have been placed on the waiting list, and how many have paid a deposit. There would be no need for this information to be categorized by race unless it were being used to ensure that the target percentage is achieved." 137 F.Supp. 2d at 842; *id.* at 230a.
- The District Court further found that "[t]he evidence shows that race is not, as defendants have argued, merely one factor which is considered among many others in the admissions process. Rather, the evidence indisputably demonstrates that the law school places a very heavy emphasis on an applicant's race in deciding whether to accept or reject." 137 F.Supp. 2d at 840; *id.* at 225a.

The District Court ruled that the Law School's racial and ethnic preferential admission policy violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.[8] The court reasoned that—notwithstanding the Powell opinion in *Bakke*—educational diversity did not provide a "compelling" justification for the Law School's use of race and ethnicity. Moreover, even if diversity could in some circumstances supply a compelling interest, the Law School's program was not "narrowly tailored" to serve that interest. The trial court noted (1) the failure to define the "critical mass" concept and connect the desired percentage to the purported goal of achieving greater viewpoint diversity in the classroom; (2) the absence of any durational limit on the Law

[8] Cato takes no position in this litigation regarding the application of Title VI to private institutions.

School's use of race; (3) the fact that the Law School's use of race to achieve certain minimum percentages of desired minority enrollment was "practically indistinguishable from a quota system," 137 F.Supp. 2d at 851; *id.* at 248a; (4) the absence of a "logical basis for the law school to have chosen the particular racial groups which receive special attention," 137 F.Supp. 2d at 851; *id.* at 249a[9]; and (5) the Law School's "apparent failure to investigate alternative means for increasing minority enrollment," 137 F.Supp. 2d at 852; *id.* at 251a.

On appeal, a divided U.S. Court of Appeals for the Sixth Circuit, sitting *en banc*, reversed. The court of appeals based its decision largely on the ground that the pursuit of viewpoint diversity provided sufficient justification for the Law School's use of racial and ethnic preferences; and that the Law School had amply shown that race-neutral admissions could not yield the desired "critical mass" of minority students. *See* 288 F.3d 732 (6th Cir. 2002) (*en banc*); *Grutter* Pet. App., App. A. On December 2, 2002, this Court granted *certiorari*.

[9] The court questioned, *inter alia*, the exclusion of Hispanics who originate from countries other than Mexico, Puerto Ricans who are not raised on the U.S. mainland, other groups such as Arabs and southern and eastern Europeans who may have similar histories of discrimination, and blacks from other parts of the world. *See* 137 F.Supp. 2d at 851-52; *Grutter* Pet. App., pp. 249a-250a. *See* note 24 *infra*.

ARGUMENT

I. THE USE OF RACIAL OR ETHNIC PREFERENCES TO ACHIEVE A "CRITICAL MASS" OF MINORITY ADMISSIONS EXCEEDS THE LIMITED PRIVILEGE, RECOGNIZED IN JUSTICE POWELL'S OPINION IN *BAKKE*, PERMITTING CONSIDERATION OF RACE AS ONLY ONE FACTOR IN A TRULY INDIVIDUALIZED DETERMINATION OF THE MERITS OF APPLICANTS.

Justice Powell's opinion in *Bakke* reflects the now-established view of the Court that any use by the state of racial and ethnic classifications is subject to the "strict scrutiny" standard of judicial review, even where such classifications purportedly work to the "benefit" of members of minority groups.[10] *See, e.g., Adarand Constructors, Inc. v.*

[10] Whether such classifications in fact "benefit" the claimed beneficiaries of such programs is highly contested, even among members of those groups. *See*, e.g., John H. McWhorter, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 225-26 (2000) (supporting temporary preferences in employment as a response to discrimination, but disapproving their use in university admissions where "the evidence suggests that most of the black-white disparity is today due to a sense of separation from scholarly endeavor internal to African-American culture."); Shelby Steele, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA 34 (1998) ("Double standards, preferential treatment, provisions for 'cultural difference,'. . . all constitute a form of exceptionalism that keeps blacks (and other minorities) down by tolerating weakness at every juncture where strength is expected of others."); *see also* Steele, *The Age of White Guilt (and the Disappearance of the Black Individual)*, HARPER'S MAGAZINE, Nov. 2002, pp. 33 ff. Moreover, recent poll data suggest that minority communities generally express similar disquiet over the use of racial and ethnic preferences. Thus, for example, a 2001 survey, conducted by the *Washington Post*, the Henry J. Kaiser Family Foundation, and Harvard University, indicates that 86% of African-Americans and 84% of Hispanic Americans believe that employment and university admissions decisions

Pena, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). There is, however, a substantial question whether that portion of Justice Powell's opinion stating that educational diversity could supply a "compelling" justification for a state university's consideration of the racial and ethnic backgrounds of applicants—a view embraced by none of the other Justices in *Bakke*[11]—constituted a holding even in that case. Because the University of California at Davis set aside specific places for minority students, Justice Powell (and four other members of the Court) voted to strike down the Davis program. A university program that used race or ethnicity as only one factor among many was not before the Court in *Bakke*.[12]

Moreover, it is doubtful that Justice Powell's position on the diversity question has ever commanded the support of a majority of the Court. Indeed, the Court's past rejection of a number of nonremedial justifications for race-based preferences casts considerable doubt on the viability of the diversity rationale. *See Croson*, 488 U.S. at 506 (rejecting "societal discrimination" rationale for use of race which, if sustained, would produce a "mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs"); *Wygant v. Jackson Board of Educ.*, 467 U.S. 267 (1986) (rejecting "role model" theory for race-based protection of

should be based strictly on merit and not include use of race or ethnicity as a factor. *See Washington Post/Kaiser/Harvard Racial Attitudes Survey, Question 50*, available at http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm

[11] Judge Boggs, dissenting in the Court of Appeals' ruling in *Grutter*, pointedly observed: "Nowhere in Justice Brennan's opinion does he mention the diversity rationale, and he explicitly did not join Part IV-D of Justice Powell's opinion, discussing the diversity rationale." 288 F.3d at 781; *Grutter* Pet. App., p. 100a.

[12] *See* Alan J. Meese, *Reinventing* Bakke, 1 GREEN BAG 2d 381 (Summer 1998).

black teachers from layoffs not tied to ~~d~~demonstrated employment discrimination); *Rice v. Cayetano*, 528 U.S. 495 (2000) (rejecting under the Fifteenth Amendment "self-governance" and fiduciary-beneficiary theories for limiting voting rights to individuals of Hawaiian ancestry concerning elections for state agency administering programs for the benefit of Hawaiian citizenry).[13]

We further note that Justice Powell's *Bakke* opinion was significantly informed by a perceived First Amendment interest in according a measure of "academic freedom" in the running of public institutions of higher learning. *See Bakke*, 438 U.S. at 311-13. That aspect of Justice Powell's opinion is difficult to square, however, with longstanding federal legislation, consistent with the Fourteenth Amendment's Equal Protection Clause, insisting on non-discrimination in all decisions taken by state actors, including universities. *See, e.g.*, Title VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d & 2000e *et seq*. It would also seem at least implicitly rejected in *Bob Jones University v. United States*, 461 U.S. 574 (1982). In that case, seven members of the Court (including Justice Powell) rejected a First Amendment challenge to the federal government's denial of tax-exempt status to a private university that maintained racially discriminatory admissions standards on the basis of religious doctrine. Noting statutes such as Title VI, *see id.* at 594, Chief Justice Burger stated for the Court: "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in

[13] In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), a 5-4 majority of the Court sustained two FCC race-based programs. That decision, involving a Fifth Amendment challenge, used an "intermediate" standard of scrutiny later rejected in *Adarand*. Although the Court in *Adarand* expressly overruled only *Metro Broadcasting*'s failure to engage in the "strict scrutiny" analysis required of all government use of race in allocating economic opportunities, *see* 515 U.S. at 227, it is doubtful that a similar agency program would be sustained after *Adarand*.

education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the 'charitable' concept [underlying the federal tax law]." *Id.* at 595-96.

Nevertheless, because respondents and the Court of Appeals below relied principally on Justice Powell's *Bakke* opinion, and that opinion marks the constitutional frontier respecting the allowable consideration of race in state-university admissions decisions, we assume for purposes of this part of the brief that Justice Powell's view—that a state university's pursuit of educational or pedagogic "diversity" can justify some consideration of the race or ethnic status of applicants—does reflect a majority position on the Court.

Even under Justice Powell's view, however, the University of Michigan's admissions system violates the Equal Protection Clause. Even if diversity can supply a compelling justification for some consideration of race, respondents' preferential admissions programs fail the constitutional test because the means chosen are not "narrowly tailored" to achieving the stated educational objective.

Respondents properly note that, at least in its current form, their deployment of racial and ethnic preferences is subtler than the University of California at Davis's "set aside" or "reserved spaces" approach struck down in *Bakke*. However, they and the appeals court below fail to appreciate that Justice Powell's limited endorsement of the consideration of race presupposed a particular framework for university admissions decisions. Justice Powell assumed such consideration would take place only as part of a truly individualized assessment of the merits of each applicant, including the individual's potential contribution to a diverse student body broadly understood to include all aspects of diversity. The state interest that "would justify consideration of race or ethnic background," Justice Powell wrote, is "*not an interest in simple ethnic diversity*," but rather "encompasses a far

broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." 438 U.S. at 315 (emphasis supplied).

For Justice Powell, the use of race might be justified when it operates as a tie-breaker among otherwise equally qualified applicants enjoying the same measure of individualized assessment. Endorsing Harvard College's self-description of its diversity admissions program (discussed as a matter of judicial notice), Justice Powell observed:

> "This kind of program treats each applicant as *an individual in the admissions process*. The applicant that loses out on the last available seat to another candidate receiving a 'plus' will not have been foreclosed from all consideration for that seat because he was not of the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* at 318 emphasis supplied.[14]

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[14] Although coming to the issue with a very different political and judicial philosophy, Justice Douglas, dissenting in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), held a similar view on the essentially *individualized* nature of the educational-diversity inquiry permitted under equal protection principles:

"The key to the problem is consideration of such applications *in a racially neutral way* . . . . There is . . . no bar to considering an individual's prior achievements in light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful legal career. Nor is there any bar to considering on an individual basis, rather than according to racial classifications, the likelihood that a particular candidate will be more likely to employ his legal skills to service communities that are not now adequately represented than will competing candidates. Not every student benefited by such an expanded admissions program would fall into one of the four racial groups involved here, but it is no drawback that other deserving applicants will also get an opportunity they would otherwise have been denied." original emphasis *Id.* at 340-41.

The key, for Justice Powell, was individualized review of the merits of applicants, each placed "on the same footing for consideration":

> "The file of a particular black student may be examined for his potential contribution for diversity when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities likely to promote beneficial educational pluralism . . . . In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them *on the same footing for consideration*, although not necessarily according them the same weight." *Id.* at 317 (emphasis supplied).

Respondents and the Court of Appeals stress the fact that, unlike the program in *Bakke*, the University's preferential admissions programs (as presently structured) do not reserve slots for particular minority groups; there is no "set aside" as such; and at all times the merits of applicants from preferred minority groups are assessed against those from non-preferred groups. But, given the findings below, this is merely a formalistic point. Here, there is no dispute that

> The University's LSA automatically gives each applicant from preferred minority groups an extra 20 points (out of a total of 150 points) that non-minorities do not receive solely because of their race or ethnic origin; the Law School is committed to admitting a "critical mass" of preferred minority students, somewhere along the range of 10 to 17% of the student

> body every year; and the record evidence is clear that being of a preferred race or ethnic group boosts the odds of acceptance "many (tens to hundreds) times" that of a similarly situated applicant from non-favored groups.

It is thus clear that for the University of Michigan, all applicants are not on "the same footing for consideration" regardless of their race or ethnicity.

Were the situation reversed and, say, a historically black college employed a similar commitment to admitting a "critical mass" of Caucasian students, it would seem highly doubtful that such an admissions program would pass constitutional muster. As Justice Powell made clear in *Bakke*, and as expressly affirmed in *Croson*, 488 U.S. at 494, and *Adarand*, 515 U.S. at 218, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual, and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.).

Whereas the University's LSA practice of automatically awarding favored minority applicants an extra 20 points is quite difficult to reconcile with the tie-breaking, individualized consideration envisioned by Justice Powell, the Law School's "critical mass" concept is entirely at odds with the very notion of *individualized* consideration. If we put aside for later discussion whether the epistemic or other pedagogic benefits of ensuring classroom representation of members of particular minority groups hold up under analysis, the Law School plainly has engaged in a use of race and ethnicity that cannot plausibly be justified in terms of Justice Powell's *Bakke* opinion.

Respondents' own expert testified in the *Grutter* litigation that if the Law School could not consider race, minority students from the preferred under-represented minority categories would have constituted "only 4% of the entering class instead of the actual enrollment of 14.5%." 288 F.3d at 732; *Grutter* Pet. App., pp. 8a-9a. Given the elusive nature of

the diversity rationale, it is difficult to say whether 4% of the entering class would be sufficient to achieve the desired pedagogic benefits. There is no finding below—indeed, respondents do not argue—that it would be insufficient.

Rather, respondents argue that a "critical mass" of minority students is needed to create a protective environment so that those students "do not feel isolated or like spokespersons for their race, and feel comfortable discussing issues freely based on their own personal experiences,"137 F.Supp. 2d at 834; *id.* at 211a (referring to testimony of Dean Lehman). Of course, this stated concern for the comfort level of preferred minority students, viewed as members of groups, is a bit at loggerheads with an individualized conception of the contribution to viewpoint diversity thought to inhere in an individual of a particular race or ethnicity. Moreover, contrary to respondents' sociological assumption, other educators have found that the use of racial preferences to ensure the presence of a "critical mass" of presumably like-minded minority students may serve more to reinforce race-based thinking on the part of those students than to liberate them to consider themselves as individuals.[15] But even if we assume that respondents' views on the pedagogic benefits of achieving a "critical mass" must be accepted, we have moved quite a distance from the individualized inquiry into the content of the character of each applicant approved in Justice Powell's opinion.

"Critical mass" calculations inevitably elide into notions of appropriate group representation. Is every minority group in the student body equally entitled to "critical mass"

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[15] *See*, e.g., McWhorter, LOSING THE RACE, *supra*, at 80 (discussing a black student who "spiritually had ensconced himself in 'black Berkeley,' living on a black dormitory floor and majoring in African-American Studies . . . [S]o determinedly reserving his sincere and open engagement for interactions with blacks only, he, too, is likely to have some trouble getting internships and jobs, and will be warmly supported by his friends in attributing this to racism.").

representation so that those students also do not feel isolated or that they must act as spokespersons for their group? As Judge Boggs, dissenting in *Grutter*, observed:

> "Since the Law School gives no principles, sociological or otherwise, by which the 'non-representativeness' of individual group members can be judged, we have to assume that a 'critical mass' would be of approximately the same size for any designated group. Thus, Afghans, Orthodox Jews, Appalachian Celts, or fundamentalist Christians might also feel that their remarks were being taken as representative, rather than individually, unless they, too, had a 'critical mass.' Then, the makeup of the entering class could be wholly determined by these groups that the Law School chose to classify as appropriate for worrying about their 'under-represented status.'" 288 F.3d at 806; *Grutter* Pet. App., p. 151a (Boggs, J., dissenting).

There is "no logical stopping point" for such use of race, a critical deficiency under "strict scrutiny" analysis, as Justice Powell stressed, writing for the plurality in *Wygant*, 476 U.S. at 275, and Justice O'Connor reaffirmed in her opinion for the plurality in *Croson*, 488 U.S. at 498. Herein lies the very path to a societal "spoils system," the avoidance of which prompted Justice Powell in *Bakke and Wygant*, the plurality in *Croson*, and the Court in *Adarand* to insist on "strict scrutiny" whenever government uses race or ethnicity to allocate public resources or burdens.

II. PURSUIT OF EDUCATIONAL OR PEDAGOGIC DIVERSITY DOES NOT PROVIDE A COMPELLING JUSTIFICATION FOR THE USE OF RACIAL OR ETHNIC PREFERENCES UNDER THE EQUAL PROTECTION CLAUSE.

Twenty-five years after Justice Powell's opinion in *Bakke*, it may be time for the Court to make clear that educational or pedagogic diversity, while a desirable objective, cannot be

pursued through government awards of racial or ethnic preferences. This is so even if the Court is not prepared to implement fully the plurality's suggestion in *Croson* that nonremedial use of race is a per se violation of equal protection: "Classifications based on race carry a danger of stigmatic harm. Unless they are *strictly reserved for remedial settings*, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 488 U.S. at 493-94 (emphasis supplied), citing *Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

The "diversity" justification is based on a host of assumptions that reflect outright racial stereotyping—that only black students can provide the necessary critical perspective on the nation's racist past, that only black instructors can teach African-American studies, that only black policemen can instill confidence and evoke a cooperative spirit in minority neighborhoods, that tolerance and the virtues of cultural diversity can be effectively communicated only by persons of the requisite skin color or ethnicity.[16] State action "'based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens'" presents "*the precise use of race as a proxy the Constitution prohibits.*" *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (emphasis added), quoting *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting). The Constitution, simply put, "provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting).[17]

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[16] Race-conscious action for remedial purposes need not embody such race-based assumptions about how people (should) think and act. *See* generally Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 U.C.L.A. L. REV. 2059 (1996).

[17] Even in the context of otherwise wholly discretionary peremptory

After this Court's clear message in *Croson and Adarand*, it is no longer adequate to say that the University's use of race as a proxy for desired viewpoints embodies no element of invidious discrimination or stigma simply because it operates for the presumed benefit of previously disadvantaged groups.[18] Invidious comparisons are necessarily made when the state assumes that some people bring more value to an institution than others who are equally if not more qualified (as determined by the institution's own generally applicable standards) simply because they have a certain skin color or ethnicity.[19] Such group-based assumptions about how

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challenges of jurors, the Court has made clear that "[r]ace cannot be a proxy for determining juror bias or competence. We may not accept as a defense to racial discrimination the very stereotype the law condemns." *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (citations omitted).

[18] *But see* note 10 *supra*.

[19] Diversity rationales often embody comparative judgments of the presumed differing contributions of particular groups. While Justice Powell in *Bakke* endorsed the modern, enlightened "Harvard Plan," an earlier Harvard admissions policy also spoke in terms of the cultural values of diversity:

> "Race is a part of the record. It is by no means the whole record, and no man will be kept out on grounds of race; but those racial characteristics which make for race isolation will, if they are borne by the individual, be taken into consideration as part of that individual's characteristics under the test of character, personality, and promise."

The New Admissions Plan, THE GADFLY (May 1926), p. 4, quoted in Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 CARDOZO L. REV. 379 , 391 (1979); *see* 288 F.3d at 793-94; *Grutter* Pet. App. 125a-126a (Boggs, J., dissenting) (quoting then Harvard president Lowell's "hauntingly similar" views). As Judge Boggs noted in his *Grutter* dissent, "race" and "character" were used by Harvard as code words for limiting the number of Jewish students: "Harvard in the 1930's did not have to say that exactly 87 percent of the seats were set aside for Gentiles—it just had to apply an admissions system based on 'character' that achieved roughly the same result." 288 F.3d at 801 & n.28; *id.* at

individuals act or think, however plausible in particular cases, cut against bedrock constitutional principle:

> "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with a respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens." *Rice v. Cayetano*, 528 U.S. at 517.

The University's preferential admissions programs are constitutionally infirm even if, in an unguarded moment, it is revealed that students from particular minority groups are preferred, not because they are likely to articulate particular views,[20] but because their very presence in the classroom

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141a & n.28. *See generally* Daniel A. Farber & Suzanna Sherry, BEYOND ALL REASON: THE RADICIAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).

[20] Former University of Michigan Law School Dean Terrance Sandalow, a noted constitutional scholar in his own right, acknowledges:

> "My own experience and that of colleagues with whom I have discussed the question, experience that concededly is limited to the classroom setting, is that racial diversity is not responsible for generating ideas unfamiliar to some members of the class. Students do, of course, quite frequently express and develop ideas that others in the class have not previously encountered, but even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so."

Terrance Sandalow, *Book Review*, 97 MICH. L. REV. 1874, 1906-07 (1999). Rather, Dean Sandalow adds, the contribution that representation of minority groups in the classroom may make to the educational experience "depends less upon the idea expressed than upon the identity of the speaker and the manner of expression." *Id.* at 1907. While "useful,"

teaches useful lessons in empathy or tolerance for non-minority students, or to ensure appropriate representation of minority groups in selective institutions of higher learning.[21]

As for the empathy/tolerance rationale, it is not clear whether racial preferences are more likely to promote tolerance or foster racial or group cleavage.[22] More important for present purposes, given the variety of racially neutral means available to the modern university to promote tolerance and emphatic understanding of differing ideas and experiences, reliance on race and ethnicity to promote this objective does not exhibit the element of necessity, of overriding justification, required of a "compelling" justification that comports with equal protection. "Strict scrutiny," the Court in *Adarand* made clear, is not "'strict in theory, but fatal in fact,'" 500 U.S. at 237. But neither can it be "strict in theory, but feeble in fact." To survive strict scrutiny, governments "must show that they had to do something and had no alternative to what they did,"[23] for "the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government." *Bush v. Vera*, 517 U.S.

"the extent of the contribution needs to be kept in perspective," for "the development of a capacity for empathic understanding of ideas and experiences different from one's own . . . does not depend upon it [*i.e.*, representation of particular minority groups in the classroom]." *Id.*

[21] Both rationales are stated in the Law School's bulletin for the 1996-1997 academic year. *See* 137 F.Supp. at 829; *Grutter* Pet. App. 201a.

[22] Although this litigation should be decided on the basis of constitutional principles, not empirical judgments, some studies suggest that "diversity is most likely to impede group functioning." Katherine Y. Williams & Charles A. O'Reilly, III, *Demography & Diversity in Organizations: A Review of 40 Years of Research*, 20 RES IN ORGANIZATIONAL BEHAV. 77, 120 (1998), quoted in Sanford Levinson, *Diversity*, 2 J. CONSTIT. L. 529, 550 & n.76 (2000).

[23] *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 949 (1997) (Posner, J.).

952, 995 (1996) (O'Connor, J., concurring). Such a showing respondents have not made (and likely cannot make). [24]

The University's group-representation rationale is likely what animates preferential admissions policies in the nation's "elite" institutions of higher learning.[25] One may question the underlying empirical assumption that, in the absence of racial preferences, there would be a significantly diminished representation of blacks or other minorities in particular professions. This is due in part to the fact that racial preferences are not likely to enlarge appreciably, if at all, the overall supply of qualified minority applications to the nation's universities, but, rather, distribute that supply in favor of the more selective institutions.

In any event, the use of race and ethnicity simply to ensure a desired racial and ethnic representation plainly fails "strict scrutiny" review, as this Court has made clear in *Croson*, *Adarand*, and Voting Rights Act cases like *Miller v. Johnson*, 515 U.S. 900 (1995). "At the same time that we combat the symptoms of racial polarization in politics" or society at large, "we must strive to eliminate unnecessary race-based

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[24] There is also a fatal under-inclusiveness to the University of Michigan's focus on selected minority groups. *See* 137 F.Supp. 2d at 851-52; *Grutter* Pet. App. 249a-51a; also note 9, *supra*. As the Court observed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993): "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." The same skepticism should apply also as a matter of equal protection.

[25] See, e.g., Sandalow, *supra*, 97 MICH. L. REV. at 1911 ("the presence of other members of their race in selective colleges and universities and in the positions to which graduation from those institutions leads may, for many, offer meaningful assurance that blacks are valued members of American society—that they have become, or at least have a realistic prospect of becoming, full participants in American life.").

state action that appears to endorse the disease." *Bush v. Vera*, 517 U.S. at 993 (O'Connor, J., concurring).

The University of Michigan is, of course, not tied to any particular admissions criteria. As long as it acts in race-neutral manner, and consistent with its pedagogic mission, it can alter its emphasis on aptitude test scores and grade point averages in any way it sees fit. The University also may act to modify criteria that are shown, on an appropriate record, to poorly predict success in college. Cf. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 435-36 (1975) (discussing concept of "differential validation" in employment testing context).

But that is not what respondents seek to accomplish here. They wish to retain their emphasis on particular combinations of aptitude test scores and grade point averages, but to vary downward the standard for applicants from preferred minority groups—the University's LSA by awarding an automatic 20 points to "qualified" minorities, the Law School through its pursuit of a "critical mass" of desired minority students. The short answer, as Justice Douglas recognized, dissenting in *DeFunis v. Odegaard*, 416 U.S. 312, 342-43 (1974), is that:

> "The State . . . may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . . A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions."

If the University of Michigan's preferential admissions policies are upheld on the basis of the justifications it has offered, such reasoning can readily be employed to "'justify' race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 495 (opinion of O'Connor, J., for the plurality).

III. NO LEGITIMATE RELIANCE INTEREST PRIVILEGES THE UNIVERSITY'S POST-1995 USE OF RACIAL AND ETHNIC PREFERENCES.

Respondents and their *amici* are likely to argue that they have legitimately relied on this Court's *Bakke* ruling, and that respect for their settled expectations since 1978 should inform this Court's constitutional ruling. To put this contention in proper perspective, it should be noted that the instant cases do not involve class actions, and the claims of the individual plaintiffs go no further back than Jennifer Gratz's 1995 application for admission to the University's LSA. *See* 122 F.Supp. 2d at 814; *Gratz* Pet. Supp. 5a.

Respondents' reliance claim lacks merit for several reasons.

First, as previously noted, Justice Powell's discussion of the diversity rationale in *Bakke* reflected the views of only one member of the Court; and his discussion of the "Harvard Plan" was not a holding necessary to resolve the merits of the "reserved places" or "set aside" plan struck down in that case.

Second, as we have attempted to show in Part I above, the University of Michigan's use of racial and ethnic preferences exceeds, by a good margin, the limited consideration of race as part of a truly individualized assessment of the merits of applicants envisioned in Justice Powell's opinion. Hence, Justice Powell's view provides no warrant for respondents' aggressive use of race, as evidenced by the University LSA's automatic conferral of 20 (out of 150 points) to applicants

from preferred minority groups and the Law School's pursuit of a "critical mass" of students from such groups amounting to 10-17 percent of each entering class.

Third, respondents, and other state universities employing similar preferential admissions programs, have been put on notice at least since the Court's June 12, 1995 ruling in *Adarand* that all government classifications based on race would receive "strict scrutiny" review, and that under this Court's prior rulings in *Wygant and Croson* nonremedial use of racial classifications would likely trigger an especially heavy burden of justification.

Fourth, the permissible use of race and ethnicity in public university admissions decisions has been heavily contested in the lower courts, resulting in rulings of unconstitutionality by the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932, *cert. denied*, 518 U.S. 1033 (1996), and Eleventh Circuit in *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.2d 1234 (2001).

In sum, respondents can offer no sound basis for arguing that they should not be held accountable for admissions decisions made in 1995 and thereafter. Absent a controlling decision of this Court, respondents certainly had every right to litigate their view of allowable constitutional limits on the use of race and ethnicity in admissions decisions. But like all litigants, they cannot avoid appropriate remedial consequences when their position is not sustained in the courts.

CONCLUSION

For the foregoing reasons, the decisions of the district court in *Gratz* and of the court of appeals in *Grutter* should be reversed.

Respectfully submitted,

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